PRIVY COUNCIL REPORT

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE v. LEE KUI JAK & ORS.

[P.C. (Lord Keith of Kinkel, Lord Griffiths, Lord Mackay of Clashfern, Lord Goff of Chieveley & Sir John Megaw) April 6 to 9 & May 14, 1987]

[Privy Council Appeal No. 13 of 1987]

Practice and Procedure – Application for injunction to restrain respondents from continuing proceedings in Texas – Claim arising out of death in helicopter crash in Brunei – Action instituted in Brunei against the operators and manufacturers of helicopter – Action brought in Texas against manufacturers, operators and Sarawak Shell – Principles applicable in law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction – Natural forum – Plaintiff to be restrained from pursuing proceedings in a foreign court if such proceedings would be vexatious or oppressive – Account to be taken of injustice to defendant if plaintiff is allowed to pursue the foreign proceedings and also of injustice to the plaintiff if he is not allowed to do so – Undertakings by the parties – Injunction granted on terms.

Injunction – Foreign proceedings – Restraint of – Forum conveniens.

In this case a helicopter had crashed near Kuala Belait in Brunei Darussalam and all the people on board were killed. Among those killed was Yong Joo San, a successful businessman with interests in Brunei and Malaysia. The helicopter was manufactured by the appellants (SNIAS), a French company in the ownership of the French State. The helicopter was owned by Bristow and Commonwealth Shipping Company and was operated and serviced by Bristow Malaysia and under contract to Sarawak Shell Bhd. Proceedings were started by Yong Joo San's widow, Lee Kui Jak, on her own behalf as widow and (with her husband's brother) as administrator of her husband's estate. Proceedings were instituted in Brunei against Bristow Malaysia and SNIAS. Proceedings were also commenced in Texas against (a) SNIAS and two associated American Companies; (b) Bristow Malaysia and two United States associated American Companies, and (c) Sarawak Shell and an associated American Company.

The appellants (SNIAS) attempted to obtain dismissal of the actions in Texas but failed. They applied in Brunei Darussalam for an injunction to restrain the plaintiffs from continuing the Texas proceedings. The application was refused in the High Court and in the Court of Appeal. The appellants appealed.

Held: (1) in a case such as the present where a remedy for a particular wrong is available both in Brunei and in a foreign court, the Brunei court will generally speaking only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the Brunei court must conclude that it provides the natural forum for the trial of the action, and further since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings but also of injustice to the plaintiff if he is not allowed to do so;

(2) the court will not therefore grant an injunction if by doing so it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. That problem can often be overcome by appropriate undertakings given by the defendant or by granting an injunction upon appropriate terms; just as in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum, which is *prima facie* inappropriate, can likewise often be solved by granting a stay upon terms;

(3) in this case if the question had arisen shortly after the commencement of the proceedings by the plaintiffs in Brunei, there were strong connecting factors with Brunei as a forum;

(4) the matters relied upon by the plaintiffs are not so much connecting factors with Texas which now render Texas the natural forum as advantages available to the plaintiffs in Texas of which they submit, it would be unjust to deprive them. In any event these points have been effectively neutralised by the undertakings given on behalf of SNIAS;

(5) the Court of Appeal in Brunei in concluding that Texas had replaced Brunei as the natural forum had taken into account matters which they ought not to have taken into account. The natural forum for the trial of the action remains, as it always has been, the courts of Brunei;

(6) the mere fact that the courts of Brunei provide the natural forum for the action is not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice; and in the context of the present case, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive;

(7) it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking in an inappropriate forum to impose a strict liability or liability for punitive damages which would not be available in the natural forum. These points have been effectively neutralised by the plaintiff's undertaking that neither of these will be pursued and by their further undertaking that they will not invoke jury trial which coupled with the effect of the contingency fee system might lead to a substantial enhancement of an award of damages;

(8) in this case it appears that the appellants (SNIAS) are in the unenviable position that if the plaintiffs are not restrained from continuing their proceedings in Texas, SNIAS may well be unable to claim over against Bristow Malaysia (who are contesting the jurisdiction of the Texas courts) in those proceedings; and that if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this could involve, including the possibility of inconsistent conclusions on the issue of liability;

(9) for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence, could indeed lead to serious injustice to SNIAS, and the plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore no objection to the grant of an injunction to restrain the plaintiffs

from continuing with those proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by SNIAS. It follows that an injunction should be granted;

(10) the appeal should therefore be allowed and an injunction ought to be granted restraining the plaintiffs-respondents from further proceeding with their action against the appellants in the Texas court, either by themselves or by any other person on their behalf, such an injunction to be granted on terms.

Cases referred to:

(1) *Spiliada Maritime Corporation* v. *Cansulex Ltd.* [1986] 3 W.L.R. 972; [1986] 3 All E.R. 843.
(2) *Castanho* v. *Brown & Root (UK) Ltd. & Anor.* [1981] A.C. 557.
(3) *MacShannon* v. *Rockware Glass Ltd.* [1978] A.C. 795, 812.
(4) *Bushby* v. *Munday* (1821) 5 Madd. 297, 307; 56 E.R. 908.
(5) *Carron Iron Co.* v. *Maclaren* (1855) 5 H.L. Cas. 416, 453; 10 E.R. 961, 976.
(6) *British Airways Board* v. *Laker Airways Ltd.* [1985] A.C. 58, 81.
(7) *In re the North Carolina Estate Co.* (1899) 5 T.L.R. 328.
(8) *Cohen* v. *Rothfield* [1919] 1 K.B. 410, 413.
(9) *South Carolina Insurance Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] 1 A.C. 24, 45; [1986] 3 All E.R. 487.
(10) *Mc Henry* v. *Lewis* (1882) 22 Ch.D. 397.
(11) *Peruvian Guano Co.* v. *Bockwoldt* (1882) 23 Ch.D. 225.
(12) *St. Pierre* v. *South American Stores (Gath and Chaves) Ltd.* [1936] 1 K.B. 382, 398.
(13) *Hyman* v. *Helm* (1883) 24 Ch. D. 531, 537.
(14) *Young* v. *Barclay* (1846) 8 Dunl. (Ct. of Sess.) 774.
(15) *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136.
(16) *Harris* v. *Empress Motors Ltd.* [1983] 3 All E.R. 561.
(17) *The Cambridgeshire,* action started on October 15, 1984 before Staughton J. (unreported).
(18) *Comex Houlder Diving Ltd.* v. *Colne Fishing Co. Ltd. & Ors.* [1987] 4 C.L. 36.

PRIVY COUNCIL APPEAL FROM BRUNEI DARUSSALAM.

Ian Hunter Q.C. (*David Joseph* with him) for the appellants.

Nicholas Chambers Q.C. (*Raymond Szetu* with him) for the respondents.

Cur. Adv. Vult.

Lord Goff of Chieveley (delivering the Judgment of the Board): There is before their Lordships an appeal by the appellants, Societe Nationale Industrielle Aerospatiale (whom their Lordships will refer to as "SNIAS"), from a judgment of the Court of Appeal of Brunei Darussalam delivered on March 20, 1987, in which the Court of Appeal dismissed an appeal from a decision of Mr. Commissioner Rhind (delivered orally on December 22, 1986, and in writing on January 16, 1987) declining to grant an injunction restraining the respondents from continuing proceedings commenced by them in the 61st Judicial District Court of Harris County, Texas.

The matter has arisen as follows. On December 16, 1980, a Puma 330J helicopter crashed near Kuala Belait in Brunei. There were 12 people on board: all were killed. Among those killed was Yong Joon San.

Yong Joon San was a very successful businessman. His home was in Brunei, where he lived with his wife and children. His main business (carried on by him under the name of Yong Joon San General Contractor) with a business in his sole proprietorship concerned with providing catering services to oil rigs and other structures operating off Brunei. He also had a much smaller business in Malaysia called Yong & Company, which was likewise in his sole proprietorship. It appears from the evidence presently available that Yong Joon San was making a very substantial income from his business activities, and especially from his catering business in Brunei; and that in addition he was making substantial sums on the New York Stock Exchange. One estimate given of his income in the year before his death was over US$1,800,000. It has also been stated that, by the time of his death, he had accumulated a fortune in the region of US$20,000,000.

The Puma helicopter which crashed was manufactured by SNIAS in France in 1978. SNIAS is a French company in the ownership of the French state. The helicopter in question was owned by an English company, British and Commonwealth Shipping Company (Aviation) Ltd. ("British and Commonwealth"); but it was at all material times operated and serviced by Bristow Helicopters Malaysia Sdn. Bhd. ("Bristow Malaysia"), an associated company of Bristow Helicopters Ltd. ("Bristow UK"), and was under contract to Sarawak Shell Bhd. and so was based at Miri Airport in Sarawak. The Bristow companies are ultimately owned by British and Commonwealth.

The Brunei Government ordered an inquiry into the accident. The inquiry was conducted by the Brunei Chief Inspector of Accidents, Mr. J.M. Holden. His report was submitted to the Director of Civil Aviation of Brunei on July 20, 1982. The main conclusion of the Report was as follows:

"... the most likely cause of the accident was a planetary gear failure in the second stage of the two stage epicyclic main gear box reduction gear; the associated metal debris caused jamming within the rotating assemblies, generating forces which fractured the common epicyclic ring gear and the main gearbox casing. This resulted in a gross instability in the rotor system which caused blades to strike the fuselage."

It was further concluded that "the initial cause of the accident was due to the mistaken health monitoring of the gearbox leading to a deterioration of the mechanical condition of the gearbox components." (Another possible cause was briefly mentioned, but their Lordships were informed that this is no longer regarded as a serious possibility and it can therefore be disregarded).

The point about "mistaken health monitoring of the gearbox" is explained in the body of the Report. The maintenance practices to be followed in the event of gearbox contamination are set out in the SNIAS Maintenance Manual, which refers to nickel or carbon steel particles taken from the filter and magnetic plug, and lays down a procedure to be followed in the event of over 50mm^2 of such particles being collected. As is pointed out in the Report, this implies that debris from the filter and magnetic plug should be laid out and measured on a cumulative basis until the maximum allowable measured area (50mm^2) is reached; at that stage, the relevant component (either main gearbox or main rotor head) should be returned to the factory and a new component fitted. The Report continues (at p. 11):

"On January 30, 1980 instructions had been received at Miri from Bristow Helicopters Ltd. in the United Kingdom, following advice from Aerospatiale, that "metal particles which are less than 50mm sq., i.e. 6 X 8mm are acceptable." This was attempting to confirm the information contained in the Standard Practices Manual.

Despite the above clarification, all the engineers concerned with the maintenance of Puma 9 M-SSC at Miri misinterpreted the maximum allowable area of particles of 50mm^2 (50 square millimetres) and in all cases it was understood to mean the area of a square with 50mm sides (2500 square millimetres).

According to Bristow's Deputy Chief Engineer at Miri, the practices recommended in the Maintenance and Standard Practices Manuals were carried out but there is no written record of the daily measured or cumulative total area of particle debris obtained from the filter and the magnetic plug. However, the actual debris was retained and subsequently handed over to the investigators who assessed the total area as 1580mm^2 (1580 square millimetres) or over thirty times the maximum allowable area."

It was however later stated in the Report (at page 12) that "although the Standard Practices Manual is categoric in stating that a gearbox which has produced more than 50mm^2 of metal should be removed and returned to the factory, the Miri engineers had some justification for thinking that this instruction was not to be taken too literally."

In paragraph 3 of the Report headed "Conclusions," Finding 2 is as follows:

"Gross contamination of the main gearbox magnetic plug and filter had occurred during the six weeks preceding the accident. The particles had undoubtedly originated from the second stage planet pinion bearing surfaces. Maintenance personnel had wrongly interpreted the amount of allowable debris as defined in the Aerospatiale Standard Practices Manual, due to the mistaken interpretation of an unfamiliar metric term."

And in paragraph 4, headed "Recommendations," the first Recommendation is as follows:

"Any possibility of misinterpretation of the terms used in the Puma Standard Practices Manual, on the allowable areas of debris from the main gearbox, should be corrected."

Proceedings were started by Yong Joon San's widow, Lee Kui Jak, on her own behalf as widow and (with her husband's brother) as administrator of her husband's estate; they are the respondents to the present appeal. For convenience their Lordships will refer to them as "the plaintiffs." Three sets of proceedings were started, in December 1981, in Brunei, France and Texas respectively. The Brunei proceedings were issued on December 9, 1981, against Bristow Malaysia as first defendants and SNIAS as second defendants; they were served on SNIAS in December 1982. It was alleged that Bristow Malaysia were solely responsible for the accident; as against SNIAS, allegations were made of negligent design and manufacture, but no particulars were given. The French proceedings were against SNIAS alone. No further steps were taken in those proceedings, and they have been discontinued long ago. The Texas proceedings were also issued on December 9, 1981. Among the plaintiffs was a Richard J. Kittrell; it appears that he is a New York attorney who was appointed administrator for the purpose of the proceedings, and was as such simply a nominal plaintiff. There were eight defendants in the Texas proceedings, who fall into three groups:

(1) SNIAS, together with two United States associates of SNIAS – Aerospatiale Helicopter Corporation ("AHC"), a Texas Corporation, and European Aerospace Corporation ("EAC"), a Delaware Corporation.

(2) Bristow Malaysia, together with 2 United States associated companies – Bristow Helicopters Inc., a Connecticut Corporation, and Bristow Offshore Helicopters Inc., a Texas Corporation.

(3) Sarawak Shell Bhd., together with Shell Oil Company, a Delaware Corporation.

The plaintiffs' claim against SNIAS was advanced under the Texas Wrongful Death Statute (section 71.031 of the Texas Civil Practice and Remedies Code), which can apparently be invoked notwithstanding that the deceased had no connection with Texas and that the accident causing death occurred elsewhere, jurisdiction being asserted on the basis that SNIAS were doing business in Texas by selling their products to purchasers in Texas, *i.e.* to their subsidiary AHC. The lawyers responsible for launching the Texas proceedings were Messrs. Speiser, Krause and Madole of New York, a specialist firm of aviation lawyers, acting on the instructions of the plaintiffs' Brunei lawyer, Mr. Szetu. The reasons for launching them were subsequently stated by Mr. Szetu (in an affidavit dated January 30, 1984) to be (1) the more favourable Texas law on product liability, and (2) the higher level of damages awarded in courts in the United States. Shortly after the Texas proceedings were commenced, the Texas lawyers acting for SNIAS attempted to have the case removed to the Federal Court; but in mid-1982 the Federal Court remitted the case back to the State Court.

In the course of 1983, an agreement was reached whereby all proceedings as between the plaintiffs on the one hand, and the Bristow companies and the Shell companies on the other hand, were settled. A general release was granted to these companies by the plaintiffs and by Richard Kittrell. The amount payable, and no doubt paid, to the plaintiffs under the settlement was US$430,000; of this sum, US$107,500 was to go to Messrs. Speiser, Krause and Madole, and Mr. Kittrell. The settlement, together with an apportionment between the widow and her three children, was approved by the Chief Registrar in Brunei on June 24, 1984. SNIAS were not parties to the settlement, and their Lordships were told that they were never invited to be parties to it.

Meanwhile, it appears that little progress was being made in the Texas proceedings against SNIAS and their associated companies. However in March 1985 the plaintiffs decided to instruct fresh attorneys in the United States, changing from Messrs. Speiser Krause and Madole of New York to a Mr. Mithoff and a Mr. Jacks, members of two comparatively small firms which practise in Houston, Texas, and which specialise in personal injury claims. Thereafter, it seems that they proceeded to obtain discovery with a view to establishing jurisdiction over the three Aerospatiale defendants. However in February 1986 a vigilant computer drew the attention of the Texas court to the lack of progress in these proceedings, and the court of its own motion took the formal step of listing the case for dismissal for want of prosecution. On March 14, 1986, the plaintiffs filed a motion to retain; and on May 28, 1986, the defendants filed a motion to dismiss on the ground of *forum non conveniens.* The court decided not to dismiss the action for want of prosecution, but fixed a trial date for November 10, 1986. Briefs were filed on the motion to dismiss on the ground of *forum non conveniens.* This motion was opposed by the plaintiffs on two grounds: (1) that where a claim is made under the Texas Wrongful Death Statute, as a matter of construction the doctrine of *forum non conveniens* has no application; and (2) that, in the alternative, the Court should in any event exercise its discretion to refuse the defendants' motion on the ground of *forum non conveniens.* On August 14, 1986, the Texas court refused the defendants' motion. In accordance with the practice of that court, no reasons were given for the decision; it is impossible therefore to know whether the decision was made on the first or the second ground advanced by the plaintiffs, nor, if the decision was made on the second ground, for what reasons it was held that the Texas court should not give effect to the doctrine of *forum non conveniens.* Furthermore, under the procedure of the Texas court, no appeal lay from this decision. An attempt was made to have the decision reviewed by petitioning the Court of Appeals for a writ of *mandamus;* but this failed, the petition being dismissed on October 2, 1986. A further petition to the Texas Supreme Court was dismissed on November 5, 1986; and a petition for a re-hearing was dismissed on December 3, 1986. By then, the defendants had exhausted their remedies in Texas. Meanwhile the plaintiffs' new Texas attorneys had turned their attention to the substantive issues in the case, taking depositions from a number of employees of AHC in Texas. The trial date of November 10, 1986, was vacated as impracticable; and a new date was fixed for February 1987. That date, too, has since been vacated; the trial in Texas is at present fixed for June 1, 1987. Between December 1986 and March 1987, a number of depositions were taken

by the plaintiffs' Texas attorneys in France from employees of SNIAS.

In December 1986, having failed in their attempts to obtain dismissal of the proceedings against them and their associated companies in Texas, SNIAS turned their attention to the possibility of obtaining an injunction from the Brunei court restraining the plaintiffs from continuing the Texas proceedings. Having taken advice from English and Brunei solicitors, it was decided to make an immediate application because it transpired that a judge would be available until December 23, 1986, but that thereafter no judge would be available until late January 1987. Accordingly, the application was made to Mr. Commissioner Rhind on December 20, 1986; on December 22, he refused to grant an injunction, giving his reasons in writing later, on January 16, 1987. It is now accepted on both sides that, due to the limited time available, the evidence laid before the learned Commissioner was inadequate and, to some extent, misleading. Their Lordships trust that, in these circumstances, they will not be thought to be lacking in courtesy if they do not refer to his judgment.

SNIAS then lodged a notice of appeal and, having regard to the urgency of the matter, a Court of Appeal was specially assembled to hear the appeal in March 1987. The hearing began on March 19. Substantial further evidence was put in by both sides in the course of the hearing of the appeal: indeed it was common ground between the parties that the Court of Appeal should consider the matter *de novo*. An additional reason for taking this course was that a full report of the decision of the House of Lords in *Spiliada Maritime Corporation* v. *Cansulex Ltd.*[1] was available to the Court of Appeal; no such report had been available to Mr. Commissioner Rhind. Furthermore, during the hearing undertakings were given by both sides, no doubt with a view to fortifying their respective positions. The plaintiffs first stated that, if SNIAS wished for trial by judge alone in Texas, the plaintiffs would agree to such a trial. Second, they accepted that, the law of Brunei being applicable both as to liability and quantum in respect of the trial of the matter in Texas, no claim lay against SNIAS either (a) in consequence of strict liability, or (b) for punitive damages. In their turn, SNIAS gave a number of undertakings. These run to nearly 3 pages; the full text is appended to this opinion. The most important are the following:

"1. To provide the plaintiffs within 28 days with two irrevocable Letters of Credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto.

...

5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery.

(SNIAS' position is that they are willing to undertake that they will procure AHC to make any further documentary discovery of documents in the possession custody or power of AHC which plaintiffs may require. SNIAS are unwilling to accept further deposition-taking in Texas unless the Court takes the view that no injunction will be granted in the absence of such undertaking).

6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the Court and to co-operate in every way practicable to keep such date effective.

7. To co-operate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of:

William Thomas Jacks
and
Richard Warner Mithoff.

8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas Action."

The undertakings of SNIAS included in addition two alternative clauses regarding the payment of the costs of the plaintiffs' Texas attorneys.

In addition, there were certain developments regarding the position of Bristow Malaysia. In the course of the hearing before the Court of Appeal, a contribution notice was served on Bristow Malaysia by SNIAS. It has been suggested that this was in fact too late, because Bristow Malaysia were no longer parties to the action. But this was disputed, and in any event Bristow Malaysia have indicated their readiness to accept service within the jurisdiction of the Brunei court of any third party notice issued by SNIAS. It appears that, whereas Bristow Malaysia are vigorously resisting Texas jurisdiction on the ground that they have never done business in Texas, they have indicated their readiness to submit to the jurisdiction of the courts in Brunei to enable the whole case to be determined there. On the same day, March 18, 1987, SNIAS accepted service of a writ issued against them on December 16, 1986 (one day before the expiry of the limitation period) by the owners of the crashed helicopter together with the insurers of the hull.

Their Lordships now turn to the judgments of

the Court of Appeal. The leading judgment was delivered by Mr. Commissioner Kempster. He referred first to the speech of Lord Scarman in *Castanho* v. *Brown & Root (U.K.) Ltd. & Anor.*[2] In his speech Lord Scarman recognised that, in a case where a party seeks to enjoin another party from proceeding against him in another jurisdiction, such an injunction can be granted "where it is appropriate to avoid injustice" (see p. 573). He then said (p. 574):

"I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings."

Next, he referred to a much quoted passage from Lord Diplock's speech in *MacShannon* v. *Rockware Glass Ltd.*,[3] concerning the circumstances in which a stay of proceedings may be granted, *viz.*:

"In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

Lord Scarman continued (at p. 575):

"Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience and expense, *and* (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction."

Mr. Commissioner Kempster then proceeded to apply the principle thus stated by Lord Scarman. He first considered a submission advanced by Mr. Hunter for SNIAS that justice could be done in Brunei at substantially less expense to them because, if held liable to the plaintiffs, they intended to seek contribution or indemnity from Bristow Malaysia who were not amenable to the jurisdiction of the court in Texas, and one set of proceedings in Brunei involving the plaintiffs, SNIAS and Bristow Malaysia would be less expensive than two sets of proceedings, one between the plaintiffs and SNIAS in Texas and another between SNIAS and Bristow Malaysia in Brunei. Mr. Commissioner Kempster declined to accept this submission. He considered that a "desperate flurry of procedural steps" had been "procured" by SNIAS to support this argument. He said:

"The contribution point does not appear to have been argued before Mr. Commissioner Rhind, though the convenience of Brunei for Bristows was urged, and had only belatedly been mentioned in the course of the attempts to challenge the jurisdiction of the Texan courts. A party seeking a discretionary remedy must get his tackle in order and proceed with due expedition and Aerospatiale had no good reason to defer the service of a contribution notice on Bristows in Brunei particularly after receipt of a letter in April 1983 telling them of the settlement between the plaintiffs and Bristows. A fortiori after their objections to the Texan jurisdiction had to all intents and purposes failed in August 1986. Securing the promise of Bristows to submit to the jurisdiction after enquiry by this court as to the real state of play comes, in my view, too late to allow a real rather than a hypothetical possibility of proceedings both in Texas and Brunei (lis alibi pendens) to weigh in the balance."

He then turned to consider "personal or juridical advantages" redounding to the advantage of the plaintiffs by continuing the suit in Texas. He recognised that the plaintiffs no longer maintained that they had the advantage of strict liability or the prospect of higher damages in Texas; though he considered that there was a prospect of an early hearing in Texas. He further referred to "substantial pre-trial discovery of documents and witnesses" which had taken place and continued to take place due to the industry of the Texan attorneys acting for the plaintiffs, and to the fact that these attorneys were familiar with the case. He concluded:

"In my opinion the prospects of an early trial and the availability of a skilled professional team, both in Texas, constitute personal and juridical advantages of which the plaintiffs should not lightly be deprived."

On a submission by SNIAS that the Brunei courts were better able to apply Brunei law on liability and quantum, he declined to query the competence of the Texas judiciary on these matters. Costs he regarded as a neutral factor; so also, in the light of SNIAS' undertaking to open letters of credit to cover a possible award of damages and costs, did he regard the availability of assets to satisfy any judgment against SNIAS. He took into account the other undertakings of SNIAS. On this aspect of the case, he concluded as follows:

"It transpires that no witnesses relevant to liability are presently to be found in Brunei and only a few relevant to damages. That the helicopter crashed here rather in Malaysia was fortuitous; the only real links with this country being the residence of the deceased and his family, the applicability of its law and the fact that a Report on the accident was prepared here. Applying the principles enun-

ciated by Lord Scarman in *Castanho* in the light of the foregoing conclusions and undertakings I am satisfied that Aerospatiale has failed to demonstrate that justice can be done in Brunei at substantially less inconvenience and expense than in Texas and, insofar as it is necessary so to determine, that the injunction sought would deprive the plaintiffs of legitimate personal and juridical advantages."

Mr. Commissioner Kempster then turned to consider whether, and if so how, the principles outlined in *Castanho* had been affected by the subsequent decision of the House of Lords in *The Spiliada.* He said:

"It remains to consider whether and if so how the principles outlined in *Castanho* have been affected by the subsequent decision of the House of Lords in *Spiliada* when, as in the instant case, 'parties to a dispute have chosen to litigate in order to determine where they shall litigate.' Lord Goff's speech does not purport to deal with the grant or refusal of an injunction restraining the continuance of proceedings overseas but it does, I think, nonetheless require us to consider the application to the material facts of the 'forum non conveniens' doctrine. After all it would be inelegant and anomalous to say the least if similar principles did not fall for consideration in the three related types of application giving rise to the authoritative decisions already cited. Which then is the 'appropriate' or 'natural' forum in the sense that litigation there is the more likely to secure the ends of justice? If it is Brunei, the jurisdiction with which, in 1981, the dispute might have been thought more closely connected, it will be proper to consider the exercise of our discretion but if, for the reasons already given when seeking to apply the *Castanho* pinciples, it is or has since become, as I believe, Texas it will be wrong in principle to consider such exercise. Likewise if we were not satisfied that any forum was 'appropriate' or 'natural.'

However the problem is approached I am satisfied that Mr. Commissioner Rhind was right in finding that Texas is presently the 'appropriate' and 'natural' forum and that Aerospatiale fail in their application. The relief sought is not necessary in the interests of justice. I would dismiss the appeal accordingly."

Mr. Commissioner O'Connor delivered a concurring judgment to the same effect. The President of the Court, Sir Geoffrey Briggs, agreed.

It is plain from their judgments that the Court of Appeal were concerned, and understandably concerned, about the relationship between the decisions of the House of Lords in *Castanho* and *The Spiliada.* Since a proper identification of the applicable legal principles lies at the heart of the present case, their Lordships consider that their first duty is to identify those principles, giving due consideration to those two decisions. That they should undertake this task is, they consider, all the more necessary because certain observations of Lord Scarman in *Castanho* are substantially founded on the much-quoted *dictum* of Lord Diplock in *MacShannon* which has to a considerable extent been overtaken by the subsequent development of the law in *The Spiliada* at pp. 984-7, 991-3. For this purpose, no material distinction is to be drawn between the law of Brunei and the law of England.

The law relating to injunctions restraining a party from commencing or pursuing legal proceedings in a foreign jurisdiction has a long history, stretching back at least as far as the early 19th century. From an early stage, certain basic principles emerged which are now beyond dispute. First, the jurisdiction is to be exercised when the "ends of justice" require it (see *Bushby* v. *Munday*[4] at p. 307, *per* Sir John Leach V.-C.; *Carron Iron Co.* v. *MacLaren*[5] at p. 453, *per* Lord St. Leonards (in a dissenting speech, the force of which was however recognised by Lord Brougham at p. 459)). This fundamental principle has been reasserted in recent years, notably by Lord Scarman in *Castanho* and by Lord Diplock in *British Airways Board* v. *Laker Airways Ltd.*[6] Second, where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed. As Sir John Leach V.-C. said in *Bushby* v. *Munday* at p. 307:

"If a defendant who was ordered by this Court to discontinue a proceeding which he has commenced against the plaintiff, in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceedings, this Court does not pretend to any interference with the other Courts; it acts upon the defendant by punishment for his contempt in his disobedience to the order of the Court ..."

There are, of course, many other statements in the cases to the same effect. Third, it follows that an injunction will only be issued restraining a party who is amenable to the jurisdiction of the Court, against whom an injunction will be an effective remedy: see, *e.g., In re The North Carolina Estate Co.*[7] at p. 328, *per* Chitty J. Fourth, it has been emphasised on many occasions that, since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution; see *e.g., Cohen* v. *Rothfield*[8] at p. 413, *per* Scrutton L.J., and, in more recent times, *Castanho* at p. 573, *per* Lord Scarman. All of this is, their Lordships think, uncontroversial; but it has to be recognised that it does not provide very much guidance to judges at first instance who have to decide whether or not to exercise the jurisdiction in any particular case.

The decided cases, stretching back over a hun-

dred years and more, provide however a useful source of experience from which guidance may be drawn. They show, moreover, judges seeking to apply the fundamental principles in certain categories of case, while at the same time never asserting that the jurisdiction is to be confined to those categories. Their Lordships were helpfully taken through many of the authorities by counsel in the present case. One such category of case arises where an estate is being administered in this country, or a petition in bankruptcy has been presented in this country, or winding up proceedings have been commenced here, and an injunction is granted to restrain a person from seeking, by foreign proceedings, to obtain the sole benefit of certain foreign assets. In such cases, it may be said that the purpose of the injunction is to protect the jurisdiction of the English court. Indeed, one of their Lordships has been inclined to think that such an idea generally underlies the jurisdiction to grant injunctions restraining the pursuit of foreign proceedings: see *South Carolina Insurance Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.*[9] at p. 45, per Lord Goff of Chieveley; but their Lordships are persuaded that this is too narrow a view. Another important category of case in which injunctions may be granted is where the plaintiff has commenced proceedings against the defendant in respect of the same subject matter both in this country and overseas, and the defendant has asked the English court to compel the plaintiff to elect in which country he shall alone proceed. In such cases, there is authority that the court will only restrain the plaintiff from pursuing the foreign proceedings if the pursuit of such proceedings is regarded as vexatious or oppressive: see *McHenry* v. *Lewis,*[10] and *Peruvian Guano Co.* v. *Bockwoldt.*[11] Since in these cases the court has been presented with a choice whether to restrain the foreign proceedings or to stay the English proceedings, we find in them the germ of the idea that the same test (*i.e.*, whether the relevant proceedings are vexatious or oppressive) is applicable in both classes of case, an idea which was to bear fruit in the statement of principle by Scott L.J. in *St. Pierre* v. *South American Stores (Gath and Chaves) Ltd.*[12] in relation to staying proceedings in this country, a statement of principle now overlaid by the adoption in such cases of the Scottish principle of *forum non conveniens,* which has been gratefully incorporated into English law.

The old principle that an injunction may be granted to restrain the pursuit of foreign proceedings on the grounds of vexation or oppression, though it should not be regarded as the only ground upon which the jurisdiction may be exercised, is of such importance, and of such apparent relevance in the present case, that it is desirable to examine it in a little detail. As with the basic principle of justice underlying the whole of this jurisdiction, it has been emphasised that the notions of vexation and oppression should not be restricted by definition. As Bowen L.J. said in *McHenry* v. *Lewis* at pp. 407-8:

> "I agree that it would be most unwise, unless one was actually driven to do so for the purpose of deciding this case, to lay down any definition of what is vexatious or oppressive, or to draw a circle, so to speak, round this Court unnecessarily, and to say that it will not move outside it. I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end. I would rather do that than attempt to define what vexation and oppression mean; they must vary with the circumstances of each case."

In *Peruvian Guano Co.* v. *Bockwoldt* at p. 230, Sir George Jessel M.R. gave two examples of vexatious proceedings. One, which he called pure vexation, occurs when the proceedings are so utterly absurd that they cannot possibly succeed. Another occurs when the plaintiff, not intending to annoy or harass the defendant, but thinking he could get some fanciful advantage, sues him in two Courts at the same time under the same jurisdiction. He went on to say that similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country. Referring to *McHenry* v. *Lewis,* he summed up the position as follows: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. Now, it is easy to see why in many cases this is so, as indeed the nineteenth century cases show. For example, there may be assets available for execution in a foreign country, or another party may only be amenable to the jurisdiction of the courts of the foreign country. Indeed, it has been stressed that there is no presumption that a multiplicity of proceedings is vexatious (see *e.g. McHenry* v. *Lewis* at p. 400 *per* Jessel M.R.) and that proceedings are not to be regarded as vexatious merely because they are brought in an inconvenient place (see *Hyman* v. *Helm*[13] at p. 537, *per* Brett M.R.). But their Lordships, bearing in mind the words of caution expressed by Bowen L.J. in *McHenry* v. *Lewis* at pp. 407-8 quoted above, think it wise to remember the breadth of the jurisdiction. In particular, the possibility must be borne in mind that foreign proceedings may be restrained not only where

they are vexatious, in the sense of being frivolous or useless, but also where they are oppressive; and also that, as Bowen L.J. observed, everything depends on the circumstances of the particular case, and new circumstances have emerged which were not, perhaps, foreseen by our Victorian predecessors. Their Lordships refer, in particular, to the fact that litigants may now be encouraged to proceed in foreign jurisdictions, having no connection with the subject matter of the dispute, which exercise an exceptionally broad jurisdiction and which offer such great inducements, in particular greatly enhanced, even punitive, damages, that they may tempt litigants to pursue their remedies there. In normal circumstances, application of the now very widely recognised principle of *forum non conveniens* should ensure that the foreign court will itself, where appropriate, decline to exercise its own jurisdiction, especially as the existence of any particular advantage to the plaintiff in that jurisdiction (*e.g.* availability of assets for execution within the jurisdiction) can usually be protected, if thought appropriate, by granting a stay upon terms. But a stay may not be granted; and if, in particular, the English court concludes that it is the natural forum for the adjudication of the relevant dispute, and that by proceeding in the foreign court the plaintiff is acting oppressively, the English court may, in the interests of justice, grant an injunction restraining the plaintiff from pursuing the proceedings in the foreign court. As Bowen L.J. said in *Peruvian Guano Co.* v. *Bockwoldt* at p. 233, the court will interfere when a party is acting under colour of asking for justice "in a way which necessarily involves injustice" to others.

Now, as already recorded, in *Castanho* at p. 574, Lord Scarman expressed the opinion that it was no longer necessary to examine the earlier case law. He said:

> "I turn to consider what criteria should govern the exercise of the court's discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint of foreign proceedings."

He then proceeded to refer to the much-quoted *dictum* from the speech of Lord Diplock in *MacShannon*[3] and said:

> "Transposed into the context of the present case, this formulation means that to justify the grant of an injunction the defendants must show: (a) that the English court is a forum to whose jurisdiction they are amenable in which justice can be done at substantially less inconvenience or expense, *and* (b) the injunction must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the American jurisdiction."

Now it is to be observed, in the first place, that that approach has been overtaken by events in the form of the decision of the House of Lords in *The Spiliada*. If Lord Scarman's approach were to be adapted to take account of the statement of principle expressed in *The Spiliada* as applicable in cases of stay of proceedings, it would presumably read as follows. To justify the grant of an injunction, the defendant must show: (a) that the English Court is, the natural forum for the trial of the action, to whose jurisdiction the parties are amenable; *and* (b) that justice does not require that the action should nevertheless be allowed to proceed in the foreign court.

In practice, however, the principle so stated would have the effect that, where the parties are in dispute on the point whether the action should proceed in an English or a foreign court, the English court would be prepared, not merely to decline to adjudicate by granting a stay of proceedings on the ground that the English court was *forum non conveniens*, but, if it concluded that England was the natural forum, to restrain a party from proceeding in the foreign court *on that ground alone*. Their Lordships cannot think that this is right. Not only does it conflict with the observation of Brett M.R. in *Hyman* v. *Helm* referred to above: but it leads to the conclusion that, in a case where there is simply a difference of view between the English court and the foreign court as to which is the natural forum, the English court can arrogate to itself, by the grant of an injunction, the power to resolve that dispute. Indeed, in a passage in his speech in *British Airways Board* v. *Laker Airways Ltd.*[6] at p. 80, Lord Diplock appears to have been ready to give credence to this approach. But, with all respect, such a conclusion appears to their Lordships to be inconsistent with comity, and indeed to disregard the fundamental requirement that an injunction will only be granted where the ends of justice so require. Furthermore, if it were right, it would lead to the remarkable conclusion, that, in a case such as *MacShannon*, the Scottish court, having concluded that Scotland was the natural forum for the trial of the action, might for that reason alone grant an interdict restraining the plaintiffs from proceeding in England. Their Lordships are fortified in their opinion by the fact that, upon examining a number of authorities from the United States (for the citation of which

they are much indebted to counsel), a country where the principle of *forum non conveniens* is recognised as applicable in cases of stay of proceedings, and also authorities from the law of Scotland in which that principle has long been so applicable, they can find no trace of any suggestion that the principles applicable in cases of stay of proceedings and in cases of injunctions are the same. On the contrary, the principles applicable in those countries in cases of injunctions to restrain foreign proceedings bear a marked resemblance to those which have been applicable for many years in this country. Certainly, this has long been the law in Scotland: see, *e.g.*, *Young* v. *Barclay*,[14] where an interdict was granted restraining the pursuit of proceedings overseas on the ground that they were oppressive. There are numerous cases in the United States to the like effect. It is enough for present purposes to refer to *Moore's* Federal Practice, 2nd Edition (1986), Volume 7, paragraph 65.19.

For all these reasons, their Lordships are of the opinion that the long line of English cases concerned with injunctions restraining foreign proceedings still provides useful guidance on the circumstances in which such injunctions may be granted; though of course the law on the subject is in a continuous state of development. They are further of the opinion that the fact that the Scottish principle of *forum non conveniens* has now been adopted in England and is applicable in cases of stay of proceedings provides no good reason for departing from those principles. They wish to observe that, in *The Spiliada*, care was taken to state the principle of *forum non conveniens* without reference to cases on injunctions: see especially at page 989, *per* Lord Goff of Chieveley. They cannot help but think that the suggestion in *Castanho* that the principle is the same in cases of stay of proceedings and in cases of injunctions finds its origin in the fact that the argument of counsel before the House of Lords appears to have proceeded very substantially upon that assumption. In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, *prima facie*, inappropriate, can likewise often be solved by granting a stay upon terms.

It follows that, through no fault of theirs, the Court of Appeal did not proceed upon the correct principles in considering whether or not to grant an injunction in the present case. It is necessary therefore for their Lordships to consider *de novo*, upon the applicable principles as stated by them, whether the decision to refuse an injunction should stand.

Now if a question (which their Lordships accept could only be hypothetical) had arisen shortly after the commencement of proceedings by the plaintiffs in Brunei whether those proceedings should be stayed on the ground that there existed another forum, *i.e.* Texas, which was clearly more appropriate for the trial of the action, there can be no doubt that such a question would have been answered unhesitatingly in the negative. Obviously, there were strong connecting factors with Brunei as a forum. The fatal accident had happened there. In a sense that was fortuitous; but it carried with it the consequence that the applicable law governing the claim was the law of Brunei. Moreover that was by no means insignificant in the circumstances because, as compared with the law of Texas, no question arises under the law of Brunei of strict product liability; no question arises under the law of Brunei of punitive damages; and, perhaps most important of all, the problem does arise under the law of Brunei of an award of damages for the so called "lost years," a matter which, in the experience of some of their Lordships, has proved to be difficult enough even for those judges who have experience of it (see, in particular, *Pickett* v. *British Rail Engineering Ltd.*[15] and *Harris* v. *Empress Motors Ltd.*[16]). In addition, the deceased was resident in Brunei and carried on his principal business there; and the plaintiffs, his

widow and her co-administrator, are likewise resident in Brunei. Again, having regard to the very substantial income of the deceased, and the volatile nature of the oil industry upon which his business depended, it is plain that witnesses of fact, experienced in the conditions of that industry in Brunei, are likely to be called on the issue of quantum. As against these factors, there was absolutely nothing to connect the action with Texas at all.

Yet the Court of Appeal, like Mr. Commissioner Rhind, concluded that, by the time the matter came before them, Texas had become the natural forum for the trial of the action. In order to test that proposition it is necessary to examine what had happened to bring about, in their opinion, that change.

It is primarily on the basis of the steps taken by the plaintiffs' Texas attorneys, in late 1986 and early 1987, that the Court of Appeal considered that the natural forum for the trial of the action had become Texas. In reaching that conclusion, they decided to disregard the question of proceedings by SNIAS against Bristow Malaysia; as to that they were, in the opinion of their Lordships, in error, for reasons which will appear later. But they placed particular reliance on the work done in Texas by the plaintiffs' new Texas attorneys. In placing reliance on this factor, there is no doubt that they were influenced by the importance attached by the trial judge in *The Spiliada* to the so-called "Cambridgeshire factor," a matter which was also recognised as relevant by the House of Lords (see pages 994-5, per Lord Goff of Chieveley). But, with all respect, the two cases are poles apart. In *The Spiliada* the question at issue was the effect of wet sulphur upon the holds of ships. This question was of profound importance, not only to the shipping industry, but to the whole sulphur exporting industry in British Columbia. The first case in which the question was investigated in depth was concerned with a ship called the "Cambridgeshire," and was plainly recognised as in the nature of a test case. Armies of lawyers and experts were engaged. An enormous amount of preparatory work was undertaken; the documentation was voluminous in the extreme. The scientific investigation was of a most fundamental kind, and indeed approached the limits of scientific knowledge. The trial of *The Cambridgeshire*[17] action was begun and had proceeded for about a month when the application was made for a stay of proceedings in the case of *The Spiliada*, a parallel case raising the same profound scientific questions as those which had arisen in *The Cambridgeshire*. The application came on for hearing before Staughton J., the trial judge in *The Cambridgeshire* action. In these somewhat unusual circumstances, it is scarcely surprising that he regarded the building up of expertise and understanding among the teams of lawyers and experts in England as being a relevant factor to be taken into account when deciding whether or not to order a stay of the English proceedings in *The Spiliada;* this view was shared by the House of Lords, where it was pointed out that, in addition, the parties in both actions were substantially the same – Cansulex Ltd. being defendants in both actions, and the plaintiff shipowners in both actions being insured by the same P. and I. Club who were financing and controlling both sets of proceedings, and instructing the same lawyers in both.

Now compare that case with the present. Here there are no previous proceedings in Texas involving substantially the same parties. Here the issues do not begin to approach in complexity those involved in *The Cambridgeshire* and *The Spiliada.* Their Lordships do not wish for one moment to belittle the expertise or competence of Mr. Mithoff or Mr. Jacks; but the engineering issues which arise in the present case do not appear to be, in degree, of greater complexity than those which many lawyers, in England and in the United States, are very competent to deal with and can very readily assimilate. What has happened is simply that, during and after the period when SNIAS was seeking to obtain dismissal of the Texas proceedings on the ground of *forum non conveniens,* the plaintiffs' Texas lawyers were, in accordance with the procedure in the United States (as to which their Lordships make no criticism) seeking, by means of the generous United States procedure of pre-trial oral discovery, evidence upon which they could found a case of negligence against SNIAS. The extent of their success in this activity will no doubt be judged at the trial of the action. The nature of the case which they wish to advance against SNIAS has now been made known and, although of course contested by them, is recognised by SNIAS to be arguable. But their Lordships do not consider that the fact that the Texas lawyers have been so engaged during the period in question can possibly have the effect of now rendering Texas the natural forum for the trial of action instead of Brunei. In truth, the matters relied upon by the plaintiffs (*viz.* superior means of gathering evidence to mount a case against SNIAS; availability of expert counsel; the contingency fee system; prospects of an early trial) are not so much connecting factors with Texas which

now render Texas the natural forum as advantages available to the plaintiffs in Texas of which, they submit, it would be unjust to deprive them. In any event, these points have effectively been neutralised by undertakings given on behalf of SNIAS that such evidence as has been obtained by Mr. Mithoff and Mr. Jacks will be available in the Brunei proceedings, that every effort will be made by SNIAS to enable Mr. Mithoff and Mr. Jacks to have rights of audience in Brunei, and that they will cooperate in obtaining an early trial date there. No doubt both American attorneys would feel more at home in the courts in Texas; but that cannot be a matter of any relevance, especially as, in a case involving a claim assessed by the plaintiffs at many millions of dollars, they may well wish to instruct leading counsel from England, a course which they have indeed already taken in the injunction proceedings in Brunei and, of course, before their Lordships.

It follows that, in their Lordships' opinion, the Court of Appeal, in concluding that Texas had replaced Brunei as the natural forum, took into account matters which they ought not to have taken into account. In the opinion of their Lordships, for reasons which are already apparent, the natural forum for the trial of the action remains, as it always has been, the courts of Brunei.

It is against that background that their Lordships have to consider the crucial question, which is whether in the circumstances of this case an injunction should be granted to restrain the plaintiffs from further proceeding in Texas. The mere fact that the courts of Brunei provide the natural forum for the action is, for reasons already given, not enough of itself to justify the grant of an injunction. An injunction will only be granted to prevent injustice, and, in the context of a case such as the present, that means that the Texas proceedings must be shown in the circumstances to be vexatious or oppressive.

Now it can no longer be suggested that the Texas proceedings are vexatious or oppressive on the ground that the plaintiffs are seeking, in an inappropriate forum, to impose a strict liability or liability for punitive damages which would not be available in the natural forum. These points have been effectively neutralised by the plaintiffs' undertaking that neither of them will be pursued, and by their further undertaking that they will not invoke jury trial which, coupled with the effect of the contingency fee system, might lead to a substantial enhancement of an award of damages. These points have therefore ceased to have such relevance as they might otherwise have had. There remains however a matter to which their Lordships attach great importance; and that is the question of a claim by SNIAS over against Bristow Malaysia.

As to that, the position is as follows. First, it is plain that the American lawyers first instructed by the plaintiffs regarded Bristow Malaysia as the plaintiffs' prime target. This is scarcely surprising in the light of the conclusions contained in the Report submitted to the Brunei Department of Civil Aviation by Mr. Holden; and it is evidenced by the fact that, in the settlement of 1984, the plaintiffs did not invite SNIAS to contribute to that settlement, or indeed to be party to it. It was not until Mr. Mithoff and Mr. Jacks were instructed, some time after that settlement, that any serious effort was made to pursue the proceedings against SNIAS. In these circumstances, it seems to their Lordships inevitable that, if the proceedings are brought to trial, SNIAS will wish to seek contribution from Bristow Malaysia, rather than expose themselves to the possibility of being held wholly to blame for an accident for which, if they are responsible at all, their responsibility may prove to be relatively small as compared with that of Bristow Malaysia; and the necessity for their so proceeding is underlined by the fact that the claim now made by the plaintiffs amounts to well over US$20,000,000, and the amount of the settlement between the plaintiffs and the Bristow Shell companies, which would no doubt have to be taken into account in reduction of the plaintiffs' damages, amounts to no more than US$430,000. In addition, SNIAS, having been served with proceedings in Brunei by the owners and insurers of the hull of the helicopter, wish to claim contribution or indemnity from Bristow Malaysia in respect of that claim.

The Court of Appeal did not regard the expressed desire of SNIAS to seek contribution from Bristow Malaysia as sincere. They were impressed by the number of procedural steps taken shortly before the hearing before them: these, they considered, had been "procured" by SNIAS, and were "hardly suggestive of a long-held or sincere concern." Their Lordships do not however consider that the Court of Appeal were justified in so regarding them. There was no evidence before the Court that the steps taken by Bristow Malaysia were "procured" by SNIAS. True it is that the steps so taken were taken very late in the day;

but having regard to the obvious desirability, in the interests of SNIAS, that it should be open to them to claim over against Bristow Malaysia in the Brunei proceedings, their Lordships do not consider that the mere lateness of those steps is productive of the inference drawn by the Court of Appeal, especially when it is borne in mind that, until December 1986, the attention of SNIAS and their advisers was concentrated upon the Texas proceedings. Their Lordships do not doubt that the intention of SNIAS in claiming over against Bristow Malaysia is sincere and, indeed, of great importance to them.

So their Lordships are faced with the following situation. Bristow Malaysia are contesting the jurisdiction of the Texas court; and there is nothing before their Lordships to suggest that the grounds upon which they are contesting that jurisdiction are other than substantial. On the other hand, Bristow Malaysia are prepared to accept service of third party proceedings in Brunei served upon them by SNIAS. It follows that, if the plaintiffs are permitted to proceed with the Texas proceedings, on the evidence before their Lordships it is at least possible that Bristow Malaysia will not be party to those proceedings, with the effect that SNIAS, if held liable in Texas, will have to commence separate proceedings, presumably in Brunei, in order to seek an indemnity or contribution from Bristow Malaysia. This itself would involve multiplicity of proceedings. There are however two additional factors. First, Bristow Malaysia have already entered into a settlement with the plaintiffs, to which settlement SNIAS are not party. If SNIAS seek contribution or indemnity from Bristow Malaysia, Bristow Malaysia may wish to invoke that settlement as against the plaintiffs. Their Lordships do not wish to pre-empt any arguments which may be founded upon the settlement by Bristow Malaysia; but it is obviously desirable that, if Bristow Malaysia do take any such point, they should be able to do so in proceedings in which all three parties, the plaintiffs, SNIAS and Bristow Malaysia, are involved.

The second complicating factor is of even greater importance. In seeking contribution from Bristow Malaysia, SNIAS will have to invoke the relevant Brunei legislation which, their Lordships were informed, is in the same terms as section 6 of the English Law Reform (Married Women and Tort-feasors) Act 1935. Section 6(1)(c) provides as follows:

"6.–(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) –

...

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise ..."

Now, let it be supposed that the proceedings in Texas against SNIAS are allowed to continue to proceed, and that in those proceedings SNIAS are held liable to the plaintiffs. Then let it be further supposed that SNIAS claim contribution or indemnity from Bristow Malaysia in Brunei, relying upon a judgment of the Texas court as showing that they, SNIAS, were *liable* in respect of the relevant damage. Would that judgment provide conclusive evidence that SNIAS were so liable? Or would SNIAS have to satisfy the Brunei court, independently of that evidence, that they were in law liable for such damage? If the latter were the case, SNIAS would be exposed to two sets of proceedings in which the same issue of liability would have to be tried, and so would be exposed to the danger of inconsistent conclusions on that issue, with the conceivable result that they might be held liable to the plaintiffs in Texas without any right over against Bristow Malaysia in that court, and might be held not liable to the plaintiffs in Brunei, in which event they would have no claim over against Bristow Malaysia, even though negligence on the part of Bristow Malaysia may in fact have been a substantial cause of the accident.

The point has arisen in Scots law in the recent House of Lords case of *Comex Houlder Diving Ltd.* v. *Colne Fishing Co. Ltd. & Ors.*[18] (Judgment delivered on March 19, 1987). In Scotland, the applicable statutory provision is section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, which is not in identical terms to section 6 of the English Act of 1934. The right of contribution there arises, under section 3(2), "where any person has paid any damages or expenses in which he has been found liable in any such action as aforesaid ...": the words "any such action as aforesaid" refer back to the words in section 3(1) "any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions" in which "two or more persons are, in pursuance of the verdict of a jury or the judgment of a court, found jointly and severally liable in damages or expenses." The House of Lords held that the words "any such action as aforesaid" in section 3(2), read in con-

text, and in particular with reference to the words quoted from section 3(1), applied only to an action in the Scottish courts. It does not, of course, follow that a similar construction would be placed on different words in section 6 of the English Act of 1935, as applied in Brunei. But there is a danger that such a construction might be placed upon them, as is evidenced by the fact that, in the 15th Edition (1982) of *Clerk & Lindsell* on the Law of Torts, the view is expressed, with regard to section 1(c) of the Civil Liability (Contribution) Act 1978, which likewise refers to "any person *liable* in respect of any damage suffered by another person," that "a foreign judgment, it seems, gives no right to seek contribution from others liable in respect of the same damage" (see pp. 144-5). This is a point which it is impossible for their Lordships to resolve on an interlocutory application such as the present; but in all the circumstances their Lordships do not consider that it can be dismissed as being without substance.

So SNIAS are now, it appears, in the unenviable position that, if the plaintiffs are not restrained from continuing their proceedings in Texas, SNIAS may well be unable to claim over against Bristow Malaysia in those proceedings; and that, if held liable to the plaintiffs in the Texas court, they may have to bring a separate action in Brunei against Bristow Malaysia in which they may have to establish their own liability to the plaintiffs before they can be entitled to claim contribution from Bristow Malaysia, with all the attendant difficulties which this would involve, including the possibility of inconsistent conclusions on the issue of liability.

Their Lordships are of the opinion that for the plaintiffs to be permitted to proceed in a forum, Texas, other than the natural forum, Brunei, with that consequence, could indeed lead to serious injustice to SNIAS, and that the plaintiffs' conduct in continuing with their proceedings in Texas in these circumstances should properly be described as oppressive. Furthermore, no objection to the grant of an injunction to restrain the plaintiffs from continuing with these proceedings can be made by them on the basis of injustice to them, having regard to the undertakings given by SNIAS. It follows that, in their Lordships' opinion, an injunction should be granted.

For these reasons their Lordships are of the opinion that the appeal should be allowed, and that an injunction ought to be granted restraining the plaintiffs from further proceeding with their action against SNIAS in the Texas court, either by themselves or by any other person on their behalf, such an injunction to be granted upon terms. As at present advised, their Lordships consider that such terms should be those contained in the following undertakings of SNIAS set out in the appendix to this opinion, *viz.* 1; 2 (omitting the final parenthesis); 3; 4; 5 (omitting the final parenthesis), 6; 7; 8; 9B (substituting "March 20 1987" for "today's date" in both places where these words appear, and omitting the final parenthesis); and 12. Their Lordships wish to comment that, although the first of the letters of credit referred to in paragraph 1 of the undertakings is in a sum considerably less than that stated to be the amount of the plaintiffs' claim, nevertheless they were informed that the sum specified in the letter of credit was regarded by the plaintiffs' advisers as realistic; and further that they are prepared to allow the plaintiffs to continue the Texas proceedings until completion of pre-trial discovery simply because such discovery has already gone so far, and the trial in Brunei is likely to take place so soon, that it appears in any event to be unrealistic not to allow such discovery to be completed. If either party has any objection to the terms proposed by their Lordships, any such objection must be notified to their Lordships within 14 days, in which event their Lordships will give consideration to it; failing any such objection within such period, the terms proposed by their Lordships will become final. So far as costs are concerned, the plaintiffs must pay the costs of SNIAS before their Lordships and before the Court of Appeal. As regards the hearing before Mr. Commissioner Rhind, however, since it is apparent that neither party was fully prepared for that hearing, and that some misleading evidence was placed before the learned Commissioner, their Lordships consider that each party should bear their own costs.

APPENDIX

UNDERTAKINGS BY SNIAS

1. To provide the Plaintiffs within 28 days with two irrevocable Letters of Credit drawn in their favour and confirmed by a first class bank within Brunei in the terms annexed hereto (Annexure A).
2. Within 28 days to provide the Plaintiffs' Attorneys (Law Offices of Richard Warner Mithoff referred to herein as the Attorneys) with the documents set out in the schedule hereto (Annexure B) in accordance with the agreement between Winstol D. Carter and Tommy Jacks referred to in paragraph of the Affidavit of Tommy Jacks.

(SNIAS say this is subject to confirmation from Carter of Fulbrights that such agreement exists with Jacks. No difficulty anticipated in this respect).

3. In addition to the documents set out in Annexure B, to produce as discovery by list within 21 days all documents relevant to the matters in question between the parties in accordance with the Brunei Rules of Court save where already disclosed. Inspection to be within 14 days thereafter. All copies requested by the Plaintiffs to be supplied within 14 days of such request. Plaintiffs to pay all reasonable copying charges.
4. If and in so far as any representations are necessary to the French Ministry of Justice or any other authority to obtain permission for any act referred to herein, to make all such representations vigorously and with minimum delay and to inform the Plaintiffs' Attorneys upon their requests of the steps so taken.
5. That the Texas proceedings shall be permitted to continue until completion of pre-trial discovery.
(SNIAS' position is that they are willing to undertake that they will procure AHC to make any further documentary discovery of documents in the possession custody or power of AHC which Plaintiffs may require. SNIAS are unwilling to accept further deposit-taking in Texas unless the Court takes the view that no injunction will be granted in the absence of such undertaking).
6. To agree to a trial date in September/October 1987 or as soon thereafter as may be convenient to the Court and to co-operate in every way practicable to keep such date effective.
7. To co-operate in every practicable way in the admission to the Bar of Brunei Darussalam as ad hoc members for the purposes of this action of:
William Thomas Jacks
and
Richard Warner Mithoff
8. To take all such steps as may be necessary to obtain all relevant consents for the use in this action of any documents obtained by discovery in the Texas Action.

9A. *Plaintiffs' proposed clause*
To pay all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C. (the two firms) relating to the Texas Action and the Brunei Action (in the latter case up to the date of judgment in this Appeal). Thereafter to accept as costs in the cause all costs reasonably incurred by the two firms in connection with Brunei Action, it being understood that the two firms will have the main responsibility for the preparation and carriage of that Action.

B. *SNIAS' proposed clause*
To treat all reasonable costs of the firms Law Offices of Richard Warner Mithoff and Doggets, Jacks, Marston & Perlmutter, P.C. (the two firms) relating to the substantive issues (but not the jurisdiction issues) incurred in the Texas Action up to today's date as costs in cause in the Brunei Action. In relation to costs incurred by the two firms after today's date, to treat all costs reasonably so incurred in connection with the Brunei Action (other than any appeal by the Plaintiffs from the decision of the Brunei Court of Appeal) as costs in cause in the Brunei Action, it being understood that the two firms will have the main responsibility for the preparation and carriage of the Brunei Action.

(Plaintiffs seek clause A. SNIAS are prepared to agree to clause B, but if the Court were to take the view that acceptance of clause A by SNIAS were a condition precedent to the grant of the injunction they seek, they would agree to give an undertaking in the form contained in clause A).

10. There shall be liberty to apply to the High Court.
11. SNIAS to seek leave forthwith to issue a Third Party Notice and assuming such leave to be given, to serve a Third Party Statement of Claim on Bristow Malaysia within 7 days hereof. Application for third party directions to be made immediately following service of Third Party Statement of Claim.
12. All prior agreements made by SNIAS' Texas lawyers regarding authentication of documents or supplying information to be filled in blank spaces left in the oral depositions to remain in effect.
13. SNIAS will join in any application to the Brunei Courts for the initiation of any procedures available in Brunei for obtaining the foregoing oral evidence before trial in France.
(SNIAS does not agree to this but will do so if the Court directs that such undertaking ought to be given by SNIAS if an injunction is granted).

ANNEXURE A

Letter of Credit No. 1

We Bank hereby irrevocably undertake to pay you on demand any sum together with interest thereon not exceeding US$5,000,000 which may either be agreed to be due to you in respect of the liability of Societe Nationale Industrielle Aerospatiale in Suite No. 187 of 1981 as a result of the crash of a Puma 330 helicopter at Kuala Belait on December 16, 1980 or which may be adjudged due to you in respect thereof from Societe Nationale Industrielle Aerospatiale.

Letter of Credit No. 2

We Bank hereby irrevocably undertake to pay you on demand any sum not exceeding US$500,000 which may either be agreed to be due to you in respect of costs incurred in relation to Brunei Suit No. 187 of 1981 or which may be adjudged due to you in respect of such costs from Societe Nationale Industrielle Aerospatiale.

ANNEXURE B

The documents in question are as follows:

1. The design calculations and drawings referred to in that certain letter of January 1987 from Tommy Jacks to Winstol D. Carter;
2. The documents described in the Letter of Request for International Judicial Assistance of January 30, 1987 (except that, as to certain documents pertaining to sensitive current engineering projects, SNIAS may provide a description of each of said documents so that the Plaintiffs' Attorneys may better determine how essential they are to the case, and the parties will attempt to work in good faith toward the resolution of any disagreement about these documents).

3. The documents ordered to be produced by AHC by the order of the Harris County, Texas, District Court dated 1987.

Appeal allowed.

Solicitors: *Brymer Marland & Co.; Norton, Rose, Botterel & Roche.*

SINGAPORE REPORTS

BOEY KUN HONG & ORS. v. JOO HEE HOLDINGS PTE. LTD.

[C.A. (Lai Kew Chai, Rajah JJ. & Chan Sek Keong J.C.) March 17, 1987]

[Singapore – Civil Appeal No. 17 of 1986]

Contract – Option – Purchase of entire paid-up shares in company owning 3 parcels of land – Application for redevelopment approved – Alienation of State land – Warranties by appellants – Increase in premium and stamp duty – Whether appellants liable to pay.

Contract – Option – Purchase of shares subject to unqualified warranties – Breach of warranties – Increase in premium – Whether appellants liable to pay.

The appellants were at one time the shareholders of a company called Natwest Development (Pte.) Ltd. ("Natwest") whose only assets were three parcels of land. One of the parcels ("the Yellow Parcel") of approximately 465.4 sq.m. was first purchased at $1,630,000 subject to adjustment after survey and on the terms and conditions of a letter dated October 21, 1980, from the Commissioner of Lands, Singapore. The terms included the payment of stamp fees for the issue of the lease.

Originally, Natwest had obtained "in principle" approval for the erection on the development properties of a 19-storey banking hall with a plot ratio of 5 instead of the expected 10. Because of the low plot ratio, Natwest considered the development not commercially viable. Consequently, Natwest submitted new plans to the competent authority for approval to develop a 20-storey banking hall/offices on the site. "In principle" approval was given for the new proposal.

The respondents were interested in taking over the development from the appellants and so on February 19, 1981, the appellants granted an option ("the Option") to the respondents to purchase the appellants' entire shareholdings in Natwest at the price of $50 million subject to and upon the terms and conditions set for therein. Under Clause 7 of the Option, the appellants warranted to the respondents, *inter alia,* that "All development charges, architect fee, property tax, income tax, and all dues and debts of the Company have been discharged or shall be discharged on completion."

Under Clause 9 it was agreed that "Notwithstanding the completion of the sale and purchase of the said shares this Agreement shall continue to succeed and have effect until all provisions hereof have been fully and effectually performed until full effect is given to each and every provision of this Agreement."

The respondents exercised the Option on March 2, 1981. The purchase was completed on July 29, 1981.

On May 27, 1981, the Commissioner of Lands wrote to the solicitors of Natwest to inform them that the alienation of the Yellow Parcel was approved for the development of a 19-storey bank/hotel building and that since this